STATE OF MAINE
KENNEBEC, ss

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. CV-89-88

PAUL BATES, et al.,

Plaintiffs

v.

SABRA BURDICK, et al.,

Defendants

ORDER ON DEFENDANTS' MOTION FOR STAY OF RECEIVERSHIP

The defendants move for a stay of the receiver appointed for the Augusta Mental Health Institute (AMHI). The factors to be considered in granting a stay pending appeal in this case are the same factors that are considered when determining whether to grant a preliminary injunction. See Crosby v. Inhabitants of the Town of Ogunquit, No. 83-201 slip op. at 3 (Me. July 21, 1983); Ingraham v. Univ. of Maine, 441 A.2d 691, 693 (Me. 1982). Pursuant to M. R. Civ. P. 62(a) and (d) and for the following reasons, the defendants' motion is denied.

I. IRREPARABLE HARM TO DEFENDANTS

Mootness

The receiver was appointed by order dated 11/7/03. The receivership is expected to last no longer than necessary to correct the conditions that justify it. See Order after Trial on Defs.' Notice of Substantial Compliance, Part II (Part II Order) at 8. A benchmark period of one year is specified in the Part II Order. See id. According to the defendants' analysis, the appeal will be heard while the receivership is in effect.[1] See

[1] The defendants have not requested an expedited appeal. See M. R. App. P. 10(b).

Defs.' 10/10/03 Mem. of Law in Support of Mot. for Stay of Receivership Pending Appeal (10/10/03 Mem.) at 4; cf. Hazzard v. Westview Golf Club, Inc., 217 A.2d 217, 223 (Me. 1966) (sale of property had occurred by time of appeal). Accordingly, sufficient practical effects flowing from the resolution of the litigation may be considered to remain to justify hearing the appeal. See Leigh v. Augusta Mental Health Inst., 2003 ME 22, ¶ 6, 817 A.2d 881, 883. Even if the issue on appeal is moot, sufficient collateral consequences may be considered to flow from a determination of the questions presented because of the other provisions of the Part II Order. See id., at ¶ 7, 817 A.2d at 883-84.

Cost of Receivership

Based on the twelve-year history of this case, outlined in the Orders after Trial on Defendants' Notice of Substantial Compliance, the defendants' argument regarding costs does not merit serious discussion. See Order After Trial on Defs.' Notice of Substantial Compliance, Part I (Part I Order) at 3-5; see also Part II Order at 1-2. The defendants' argument is based on speculation and on the incorrect assumption that the costs for the receivership will simply be additional costs superimposed on the existing structure. Any fair reading of the Part I and Part II Orders should suggest that the days of "business as usual" are over. Finally, the interests to be protected by compliance with the Consent Decree are far more important than the cost of a receivership – a drop in the overflowing bucket of public funding the defendants have sought and received. See Blum v. Caldwell, 446 U.S. 1311, 1315-16 (1980) (balance of equities favors life and health of members of class and not economic harm to State of New York).

II. HARM TO PLAINTIFFS

The defendants' argument that there are "safeguards in place" to protect the plaintiffs if the receivership is stayed simply ignores the findings in the court's 354-page

Part I Order. See Defs.' 10/10/03 Mem. at 6. The provisions of the Consent Decree have been insufficient to protect the plaintiffs from harm. The defendants' argument that "they remain under a continuing obligation to comply with all of the Consent Decree provisions" is not persuasive. See Defs.' 10/10/03 Mem. at 5. The suggestion that the plaintiffs can always request further relief from the court, considering the litigious history of this case and recent completion of a seven-week trial, does not merit discussion.

The defendants also argue that the plaintiffs are protected by licensing and regulatory authorities. Those same authorities were in place during the time period leading to the defendants' filing the notice of substantial compliance and were either inadequate or did not address the Consent Decree requirements. See Part I Order at 14-16.

III. LIKELIHOOD OF SUCCESS ON THE MERITS

The defendants argue that the court lacks the authority to appoint a receiver, the circumstances of this case do not support the appointment of a receiver, and the scope of the receiver's powers is too broad.

Constitutional Authority to Impose a Receiver

In 1996, the court found the defendants in contempt and appointed a receiver to take over from the defendants their obligations under the Consent Decree. See 3/8/96 Order at 36-38. Appointment of the receiver was stayed "to give the defendants a final opportunity to comply" with specific provisions of the Consent Decree. See id. at 37 (emphasis in original). Both parties filed appeals but they were not pursued. The

defendants cannot now argue that they are surprised that noncompliance could result in the appointment of a receiver.[2] See Defs.' 10/10/03 Mem. at 2 n.2.

Paragraph twelve of the Settlement Agreement provides:

> Until the Agreement's termination pursuant to the terms of the Consent Decree, the parties hereby consent to the court's continuing supervision in this matter, until further order of the Court, and to its authority to interpret the provisions of this agreement, to review and adopt plans necessary to implementation of its terms, to modify its terms as may be needed to effect its purposes, and to take appropriate actions within its equitable powers to ensure its enforcement and the fulfillment of its terms and purposes.

Settlement Agreement at ¶ 12. Previously in this case, the defendants argued that the Consent Decree is the "product of negotiation" between the parties and should be interpreted in the same way as a contract. See Defs.' 6/10/94 Resp. to Pls.' First Supplemental Mem. of Law at 2. The court agreed. See 9/7/94 Order at 8; 3/8/96 Order at 34. As in any contract, the defendants assumed obligations in return for the settlement of the lawsuit against them. The methods to enforce the provisions of the Consent Decree are expressly provided in the Decree and the Settlement Agreement. In spite of the fact that appointment of a receiver is within the equity jurisdiction of the Superior Court, see 4 M.R.S.A. § 105 (2003); 14 M.R.S.A. § 6051 (2003), the defendants now object to the terms they negotiated. The defendants rely on cases very different from this case and argue that the doctrine of separation of powers requires rescinding the authority they themselves requested. See Hedges v. Dixon County, 150 U.S. 182, 192 (1893) (court of equity cannot enforce a contract void at law); LaShawn v. Barry, 144 F.3d 847, 853 (D.C.Cir. 1998) (federal district court order purported to override local law to implement consent decree);

[2] The defendants also argue that the plaintiffs did not request appointment of a receiver. In fact, the plaintiffs did request a form of external oversight. See Pls.' 3/24/03 Mem. in Lieu of Final Argument at 2. It was the court, however, that moved to determine whether the defendants were in substantial compliance and whether they were in contempt.

City of Portland v. McKernan, CV-93-54 (Me. Super. Ct., Cum. Cty., June 3, 1994) (Wernick, J.) (no consent decree involved).

This court must have power to carry out the obligations it was asked to assume. See The Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dept. of Mental Retardation, 677 N.E.2d 127, 140 (Mass. 1997) (citing Attorney Gen. v. Sheriff of Suffolk County, 477 N.E.2d 361 (Mass. 1985)). The Consent Decree was signed by a Superior Court justice and entered as a judgment of the court. See Consent Decree at 7. Allowing the executive branch to ignore orders of the court intrudes on the functions of the court. See Rotenberg Educ. Ctr., 677 N.E.2d at 140. "[W]hen the executive persists in indifference to, or neglect or disobedience of court orders, necessitating a receivership, it is the executive that could more properly be charged with contemning the separation principle." Perez v. Boston Hous. Auth., 400 N.E.2d 1231, 1252 (Mass. 1980) (receiver imposed on public body); see also Blaney v. Comm'r of Corr., 372 N.E.2d, 770, 774 n.4 (Mass. 1978) (executive branch's violation of court orders is a violation of the separation of powers by abrogating judicial decree).

Circumstances for Imposition of a Receiver

In the Part II Order, the court noted the factors to consider in determining whether a receivership is the only remedy remaining for the court to impose:

> The court should consider whether there were repeated failures to comply with the Court's orders, whether continued insistence that compliance with the court's orders would lead only to 'confrontation and delay,' if there is a lack of sufficient leadership to turn the tide within a reasonable time period, whether there was bad faith, and whether resources are being wasted. Finally, and perhaps obviously, the court must consider whether a receiver can provide a quick and efficient remedy.

Part II Order at 3 (quoting Dixon v. Barry, 967 F. Supp. 535, 550 (D.D.C. 1997) (citations omitted)). Based on the history of the case since 1990, the evidence

presented at trial, the defendants' decision to file the notice of substantial compliance, the extraordinary expenditure of state funds for the Consent Decree and for litigation, the defendants' lack of accountability, and their failure to recognize reality, the court concluded that a receivership was necessary because the defendants would not achieve substantial compliance on their own initiative. See Part II Order at 2-3.

a. Contempt

Contrary to the facts of this case and to their previous arguments, the defendants now argue that the finding of contempt was an error of law because the criteria for complying with the Consent Decree are not clear and because there is no definition of substantial compliance. The Consent Decree is a document drafted by the parties and voluntarily signed by them. It was not written by the court.

Further, the defendants could have requested amendments to the Consent Decree and Settlement Agreement if they required guidance. They requested no such amendments. In fact, as the former Master, Gerald Rodman, made clear in his testimony, he asked the defendants to establish a process to comply with paragraph 291 of the Settlement Agreement, which provides that "[t]he Master shall, in consultation with counsel for all parties, develop a process to evaluate and measure the Defendants' compliance with the terms and principles of this Agreement." Settlement Agreement at ¶ 291. The defendants rejected his suggestion. They also rejected the plaintiffs' proposal to establish a process for evaluating and measuring substantial compliance. The defendants claimed the Consent Decree itself provided an adequate process to evaluate compliance. The Master acceded to the defendants' position and no further process was established. See Part I Order at 345-46.

Even more troubling, the defendants quote the court's conclusion that "the standard for determining 'substantial compliance' cannot be defined prior to an evidentiary hearing" as suggesting that the court refused to define the term. See Defs.' 10/10/03 Mem. at 11. In fact, prior to trial, the defendants specifically requested that the court not define substantial compliance before presentation of evidence. In their memorandum, the defendants argued:

> Thus it appears that further definition of substantial compliance, beyond stating that it requires evaluation in light of the overriding purposes of the decree, must await development of facts at a hearing, including analysis in the context of specific requirements of the Settlement Agreement and of the underlying interests at stake.

See Defs.' 5/17/02 Mem. of Law Concerning Substantial Compliance at 7. The court accepted the defendants' position, over the plaintiffs' objection, and determined not to further define substantial compliance until evidence was presented. See Order on Definition of Substantial Compliance at 1; see also 9/7/94 Order at 14.

In the Part I Order, the court concluded that even if the court accepted the lower standard for measuring substantial compliance advocated by the defendants, the defendants had failed to produce evidence meeting that standard. See Part I Order at 17. The defendants could not show compliance by any standard because they had failed and refused to establish any standards by which to measure their performance and, therefore, show compliance. See, e.g., Part I Order at 2 & 20.

b. Bad Faith

Ten days after the court moved on its own to determine whether the defendants were in substantial compliance with the Consent Decree and whether the defendants were in contempt of its provisions, the defendants filed a notice of substantial compliance. Former Commissioner Duby admitted that the decision to file the notice of substantial compliance was affected by the court's order to show cause and by the

plaintiffs' statement that they would file a motion for contempt if the Department did not provide a date for substantial compliance. See Part I Order at 5.

As stated in the Part I Order, the flaws in the defendants' proof cannot be overemphasized. See Part I Order at 4-13 & 19-21. For example, the entire testimony of the current Medical Director at AMHI, Dr. William Nelson, addressed post-1/25/02 events. Dr. Benjamin Grasso, the Medical Director during the pre-1/25/02 period, was not called to testify by the defendants. See Part I Order at 19, 33, & 200-201. The court specifically rejected the assertion that the defendants filed the notice of substantial compliance because the believed they were in substantial compliance on 1/25/02. See Part I Order at 13.

Former Commissioner Duby and Superintendent Kavanaugh were not able to testify credibly about the decision to file the notice of substantial compliance. See Part I Order at 5-11. Former Commissioner Duby admitted that necessary action to remedy deficiencies had not been implemented as of 1/25/02. See Part I Order at 5. Superintendent Kavanaugh admitted that the first time she had reviewed the Consent Decree to determine the standards relied on for compliance was during the trial. See Part I Order at 6. She admitted that AMHI collected no data for some provisions of the Consent Decree. See id.

In determining to file the notice of substantial compliance, the defendants did not solicit opinions from the former Master Rodman, from Dr. Grasso, or from Dr. Andrew Wisch, the Professional Services Coordinator at AMHI. The former Master did not believe the defendants were in substantial compliance with important provisions of the Consent Decree as of 1/25/02. See Part I Order at 350. Although he was not consulted about the final decision to file the notice of substantial compliance, he discussed with the Department in 12/01 his firm opinion that the defendants were not in compliance. See

id. Dr. Grasso's testimony highlighted very serious deficiencies at AMHI as of 1/25/02. See Part I Order at 202-211.

As discussed in the Part I Order, many of the requirements of the Consent Decree have no counterpart in the JCAHO or other licensing provisions upon which the defendants continue to rely. The testimony of Ms. Duby, Ms. Kavanaugh, and Ms. Smyrski made clear that they had no reasonable basis on which to make the decision to file the notice of substantial compliance. See Part I Order at 5-13. The Director of the Division of Licensing was unable to comment at trial on any relationship between licensure and Consent Decree requirements. See Part I Order at 15.

Finally, the defendants' claim of substantial compliance should have been withdrawn when discovery and, later, trial testimony compelled the conclusion that there were significant, insurmountable gaps in the defendants' proof. See Part I Order at 19-21. The baseless filing and the regrettable decision to continue an extraordinarily expensive trial support the court's finding of bad faith.

c. Case History

In reciting the history of this case, the defendants fail to note that they were held in contempt in 1994, as well as in 1996. See Defs.' 10/10/03 Mem. at 14. In 1994, the court described the troubling attitude of the defendants toward their obligations under the Consent Decree: "The thing which the court finds most disturbing about the defendants' actions is that they seem to have operated as if there were, in fact, no court order in existence." See 9/7/94 Order at 20; see also id. at 21-22, 26, 28, & 29. In 1996, the court observed: "The testimony of the witnesses connected with the defendants made clear that the mandate of the Consent Decree is met, at best, with indifference or misunderstanding or, at worst, with disdain. See 3/8/96 Order at 32. In 2003, the court noted the absence of good faith on the part of the defendants because of the history of

the case, the defendants' dealings with the court and the Master, and the substantial time and resources devoted to an unnecessary trial as opposed to progress toward the goal of substantial compliance. See Part I Order at 14.

The Consent Decree provides an expected compliance date of 9/1/95. See Consent Decree at ¶ 9. As of 1/25/02, the defendants proved they were in substantial compliance with twenty-three of the 197 challenged paragraphs of the Consent Decree and Settlement Agreement. See Part I Order at 1-2.

d. Remedy of Last Resort

The defendants' argument about the remedy imposed is addressed above under the heading, "Circumstances for Imposition of a Receiver." The decision to impose a receivership was based on the defendants' twelve years of refusing to accept and meet their obligations under the Consent Decree and the regrettable lack of credibility of many of the defendants' witnesses. See Part I Order at 18-19 & 20-21; see also Morgan v. McDonough, 540 F.2d 527, 534 (1st Cir. 1976) (court found reasonable the transfer of positions based on resistance to segregation plan and adverse attitudes and lack of leadership). The court noted that "[i]n many instances, the defendants willfully ignored the Consent Decree or unilaterally amended its provisions without involving the court, Master, or plaintiffs." See Part II Order at 1.

Scope of Receivership

The Part II Order provides that "[t]he powers and authority of the receiver shall be those that in usual circumstances are vested in the Superintendent of AMHI as they relate to the Superintendent's duties and obligations under the Consent Decree." See Part II Order at 5. That general grant of powers and authority controls the remainder of the order appointing the receiver. See Shaw v. Allen, 771 F. Supp. 760, 764 (S.D.W. Va. 1990). To the extent that the Superintendent has the powers, authority, and duties

specified in paragraph three, the receiver is vested with those powers, authority, and duties. See id. The scope of the receiver's authority should be what is necessary. See LaShawn, 144 F.3d at 854.

The defendants' argument about what they intend to accomplish with the new Master is irrelevant. See Defs.' 10/10/03 Mem. at 14-15 & 16-17. The question of whether a receiver is required is not decided on current hopes for improvement. See Dixon, 967 F. Supp. at 553.

IV. EFFECT ON PUBLIC INTEREST

As the defendants now acknowledge, the taxpayers are paying for costs associated with the Consent Decree. See Defs.' 10/10/03 Mem. at 5; see also Part I Order at 17. It is time they received a return on their investment.

The public also will be served by holding the defendants to the 1990 commitment they themselves made to the plaintiffs to deliver mental health services in Maine in an effective manner according to the provisions of the Consent Decree and Settlement Agreement. See RBK Caly Corp. v. Brewer Water Dist., CV-94-555 (Me. Super. Ct., Pen. Cty., Dec. 23, 1994) (Kravchuk, J.) (public need for construction of facility extends beyond immediate interests of parties or rate-payers).

The entry is

> The Defendants' Motion for Stay of Receivership Pending Appeal is DENIED.

Date: December 2, 2003

Nancy Mills
Chief Justice, Superior Court